NOTICE

*Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

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| RORY CRAIG BROWN,<br><br>Appellant,<br><br>v.<br><br>STATE OF ALASKA,<br><br>Appellee. | Court of Appeals No. A-12027<br>Trial Court No. 3PA-13-504 CR<br><br>MEMORANDUM OPINION<br><br>No. 6492 — July 5, 2017 |

Appeal from the Superior Court, Third Judicial District, Palmer, Eric Smith, Judge.

Appearances: Douglas O. Moody, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Tamara E. de Lucia, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge ALLARD.

Following a jury trial, Rory Craig Brown was convicted of twenty-nine counts of first-degree sexual abuse of a minor and one count of incest based on evidence

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

that he sexually abused his stepdaughter, A.K., and his daughter, A.B., over a period of ten years. For these crimes, Brown received a composite sentence of 268 and one-half years' imprisonment with 107 years suspended (161 and one-half years to serve).

On appeal, Brown raises three claims of error. Brown argues first that the superior court erred in permitting the prosecutor to introduce various prior consistent statements by Brown's stepdaughter. Brown argues next that one of his convictions resulted from a fatal variance between the conduct charged in the indictment and the conduct proven at trial. Lastly, Brown argues that the indictment contained multiplicitous counts, requiring merger of some of his convictions.

For the reasons explained here, we find no merit to these claims. Accordingly, we affirm Brown's convictions.

*Factual background and prior proceedings*

When Brown married his wife, she had two young daughters — R.B. and A.K. The marriage produced three more children — daughter A.B. and two sons. The couple eventually divorced. After the divorce, Brown's wife (who suffered from mental illness) was declared unfit to care for her children and Brown became the custodian of all five children.

Over the course of ten years, Brown sexually abused his step-daughters and his biological daughter.

Brown began sexually abusing his oldest stepdaughter, R.B., when she was in fifth grade. Brown treated R.B. differently than the other children, taking her out for dinner, telling her she was pretty, buying her gifts, and telling her they would get married someday. Brown began sexually penetrating R.B. when she was fifteen or sixteen years old, and he continued to do so regularly until R.B. graduated from high school and left home.

Brown began sexually abusing his younger stepdaughter, A.K., when she was in third grade, and he began sexually penetrating her by the time she was in fourth grade. A.K. described Brown's abuse as methodical and conducted in "phases." During phase one — sexual contact and digital penetration — Brown would say, "I'm teaching you about sex." During phase two — penile and digital penetration — he would tell her, "I am doing this to see if I can trust you. Because if you keep it a secret, then I know that I can trust you." During the third phase — forced fellatio — Brown would tell A.K., "Your mother is not here ... and you're not my kid, so now you have to perform sexual acts to stay a part of the family." A.K. also testified that she had to perform sexual acts for permission to go to the movies or get new shoes. In addition to sexually abusing A.K., Brown also hit A.K. and beat her with belts.

When A.K. was seventeen, Brown impregnated her. Brown told A.K. to get an abortion. When A.K. threatened to use the pregnancy to expose Brown's sexual abuse, he picked up a wooden board and threatened to kill her. A.K. left Brown's house that day and never returned. A.K. had an abortion a few weeks later.

Brown began sexually abusing his biological daughter, A.B., when she was eleven years old. The sexual abuse continued for approximately two years until May 2012, when A.B.'s sisters became suspicious that Brown was abusing A.B. and reported it to the police.

Following an investigation into A.B.'s and A.K.'s allegations of sexual abuse, Brown was indicted on thirty-seven counts of first-degree sexual abuse of a minor[1] and one count of incest.[2] Brown was also charged with one count of coercion[3]

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[1] AS 11.41.434(a)(2).

[2] AS 11.41.450(a)(1).

[3] AS 11.41.530(a)(1).

based on the allegation that he forced A.K. to have an abortion. For reasons that are not clear on the current record, Brown was not charged with sexual abuse of R.B. After Brown was arrested, A.K. (who was nineteen at the time) became the legal guardian of her three younger siblings.

A.K. and A.B. both testified at trial, detailing the years of sexual abuse by Brown. R.B., the oldest stepdaughter, also testified regarding Brown's sexual abuse of her as a child. (R.B.'s testimony was admissible under Alaska Evidence Rule 404(b)(2), which permits evidence of prior sexual abuse of similar victims in child sexual abuse cases.)

Brown testified in his own defense at trial. In his testimony, Brown admitted that he beat his children with belts and that he was very controlling. However, he denied engaging in any sexual conduct with any of his children. Instead, Brown suggested that the three girls lied about the sexual abuse because they wanted to get A.B. and her brothers out of Brown's house.

Partway through the trial, the State dismissed eight of the first-degree sexual abuse of a minor counts based on a technical discrepancy regarding divorce and legal custody dates. The jury subsequently convicted Brown of the remaining twenty-nine first-degree sexual abuse of a minor counts. The jury also convicted Brown of the incest count. The jury was unable to reach a verdict on the coercion count, and the State subsequently dismissed that charge. At sentencing, the trial judge imposed a composite sentence of 268 and one-half years' imprisonment with 107 years suspended (161 and one-half years to serve).

Brown now appeals.

*The superior court did not err when it allowed the prosecutor to introduce A.K.'s prior consistent statements to her friend and boyfriend*

At trial, A.K. testified to years of sexual abuse by Brown, starting when A.K. was in the third grade and continuing through high school. A.K. also testified to Brown's pattern of control over the family and his manipulation of the children — the methods Brown had employed to keep the children from reporting the sexual abuse. A.K. testified specifically that Brown limited the friends she could talk to and he did not allow her to sleep over at friends' houses or have friends visit her house.

Brown's attorney cast doubt on these assertions through his questioning of other witnesses. In response to questioning by the defense attorney, A.B. testified that A.K. *did* have friends over to the house. A.K.'s mother likewise testified that A.K.'s friends were allowed to come over to the Brown home "to a certain extent."

To rehabilitate A.K.'s credibility, the trial judge permitted the prosecutor, over the defense's objection, to introduce testimony from a witness, Melannie Gonzalez, who had been friends with A.K. for the four years of high school. Gonzalez testified that A.K. spent the night at her house several times, but that she (Gonzalez) was never invited inside A.K.'s home. Gonzalez also testified that A.K. told her that Brown was manipulative.

On appeal, Brown argues that Gonzalez should not have been permitted to testify to A.K.'s prior consistent statements because they were inadmissible hearsay. But, for the most part, Gonzalez's testimony did not involve any prior statements by A.K. Gonzalez testified from her own personal knowledge that she was friends with A.K. and that she had never been allowed to visit A.K.'s house. This testimony was properly admissible to rebut the defense's claim that A.K. was lying when she said that Brown never allowed A.K.'s friends to come to the house. We note that Gonzalez did, at one point, testify to A.K.'s prior statement that Brown was manipulative, and we agree

with Brown that this statement was inadmissible hearsay. However, we also conclude that the admission of this hearsay statement was clearly harmless in the larger context of the trial, particularly given Brown's own testimony about his controlling behavior.[4]

Brown also challenges another instance where the trial court allowed the prosecution to introduce a prior consistent statement by A.K. After Gonzalez's testimony, the prosecutor introduced testimony from Gabreal Robertson, A.K.'s ex-boyfriend. Robertson testified that he dated A.K. for a year in high school and that she told him that her stepfather had sexually abused her. Robertson stated that he did not ask A.K. any details about the abuse because she "looked very traumatized and [he] just wanted to comfort her."

Brown's attorney objected to Robertson's testimony about A.K.'s prior statement, arguing that it was inadmissible hearsay. The trial judge overruled this objection, agreeing with the prosecutor that the statement could be admitted as a prior consistent statement under Alaska Evidence Rule 801(d)(1)(B) because it tended to rebut the defense allegation of improper motive. However, the judge also ruled that the prior statement could come in only to assist the jury in evaluating the credibility of A.K.'s testimony, and not for the truth of the matter asserted. The judge instructed the jury accordingly. On appeal, Brown argues that the judge erred in allowing the prior statement to be admitted because the statement was made after the alleged motive to fabricate had already arisen.

Under Alaska Evidence Rule 801(d)(1)(B), a witness's prior out-of-court statement is not hearsay if:

> (1) The declarant testifies at trial;
> (2) The prior statement is consistent with the declarant's testimony; and

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[4] *Love v. State*, 457 P.2d 622, 630-31 (Alaska 1969).

(3) The prior statement is offered to rebut an express or implied charge of either recent fabrication or improper influence or motive.

In *Nitz v. State*,[5] we set out four criteria governing the admissibility of prior consistent statements in cases where, as here, the witness's prior statement was made after the asserted motive to fabricate had already arisen: First, the witness must testify, and her testimony must actually be impeached by an express or implied claim of recent fabrication or improper motive.[6] Second, the court must determine that the circumstances of the prior consistent statement make it relevant on the issue of the witness's credibility, apart from the mere consistency of the statement.[7] Third, if the statement is determined to be relevant, its probative value must be found to outweigh its potential for unfair prejudice.[8] Lastly, the jury must be instructed that the statement is admissible only for the limited purpose of determining the credibility of the witness's trial testimony.[9]

All of these criteria were met in this case. A.K. testified at trial regarding Brown's sexual abuse and she was impeached at trial by Brown's attorney, who argued that A.K. and her sisters had fabricated the sexual abuse claims because they were trying to extricate A.B. and her brothers from Brown's physically abusive and controlling home. The circumstances of A.K.'s prior statement to her boyfriend were relevant to rebut this defense claim of improper motive because the statement was made under

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[5] 720 P.2d 55 (Alaska App. 1986).

[6] *Id.* at 67-68.

[7] *Id.*

[8] *Id.*

[9] *Id.*

circumstances where A.K. was *not* trying to enlist her boyfriend to help extricate her siblings from Brown's home.[10] In other words, as in *Nitz*, the probative force of the prior statement derived primarily from its underlying circumstances, and the statement was not admitted simply because it was a prior statement that was "consistent" with the witness's trial testimony.[11] Moreover, the record reflects that the judge carefully considered whether the probative value of this evidence was outweighed by its potential for unfair prejudice, and the record likewise reflects that the judge provided a proper limiting instruction under *Nitz*. Given all this, we conclude that the judge did not abuse his discretion when he allowed the prosecutor to introduce this prior statement under Evidence Rule 801(d)(1)(B)(3) to rebut the defense claim of A.K.'s improper motive.

We further note that, as the State points out on appeal, the prior statement was also likely admissible as a "first complaint" under *Nusunginya v. State*[12] and *Greenway v. State.*[13] Evidence of a victim's "first complaint" or "first report" of sexual abuse is admissible to corroborate the victim's testimony provided that the victim testifies at trial, the evidence is determined to be more probative than prejudicial, and the jury is properly instructed that the evidence is not independent proof of the truth of the

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[10] Alaska Evidence Rule 801(d)(1)(B).

[11] *See Nitz*, 720 P.2d at 68 ("Even though T.K.'s prior statements were made after her alleged motive to testify falsely existed, the probative force of the evidence, under the state's theory, derived not so much from the fact that T.K. made prior consistent statements as from the specific manner in which she made them.").

[12] 730 P.2d 172, 173-74 (Alaska App. 1986).

[13] 626 P.2d 1060, 1060-61 (Alaska 1980); *see also Nitz*, 720 P.2d at 62 ("the [first complaint] doctrine is founded on the assumption that evidence of the victim's first complaint is necessary to counteract the inference ... that might otherwise be drawn"—in other words, the inference that the victim said nothing at the time, and (thus) that nothing happened.) (citing 4 Wigmore §§ 1135-36).

allegation.[14] Evidence of a victim's "first complaint" should also be limited to the fact that the allegation occurred, supplemented by enough details to allow the trier of fact to understand that the episode the victim is talking about is the same episode that is being litigated.[15] Robertson's testimony complied with these requirements, even though the parties and the judge never expressly addressed the "first complaint" exception to the hearsay rule.

*Brown's conviction on Count XV was not the result of a fatal variance between the evidence presented at grand jury and the evidence presented at trial*

Count XV of the original indictment alleged that Brown engaged in cunnilingus with A.B. "on or about August 2011 - January 2012" — that is, during A.B.'s first semester of eighth grade. Count XV was the only charge involving cunnilingus of A.B.

In her grand jury testimony, A.B. — a ninth grader at the time — testified that Brown put his mouth on "my vaginal regions." A.B. answered in the affirmative when asked whether Brown penetrated her vagina with his tongue when she was in eighth grade.

At trial, however, A.B. testified that the cunnilingus happened on multiple occasions when she was in sixth or seventh grade. When questioned whether she thought it had also occurred in eighth grade, A.B. testified that she did not think so.

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[14] *See Nitz*, 720 P.2d at 70-71 (discussing prejudicial effect if "a parade of witnesses is allowed to offer evidence of [the victim's] prior statements" or if the testimony of "a relatively inarticulate child" is bolstered by the testimony of "a series of articulate adult witnesses").

[15] *See Borchgrevink v. State*, 239 P.3d 410, 418 (Alaska App. 2010) *overruled on other grounds by Moreno v. State*, 341 P.3d 1134 (Alaska 2015).

The day after A.B.'s testimony, the prosecutor moved to amend count XV to broaden the time period of the offense to span the period from August 2009 to May 2012. Brown objected to this mid-trial amendment, arguing that the grand jury had not indicted him for engaging in cunnilingus during that period. The prosecutor argued that the amendment did not prejudice Brown because Brown was asserting a blanket defense that none of the sexual abuse had occurred, and he was not disputing the alleged timing of the events. The trial judge agreed that modifying the date range for Count XV did not prejudice Brown, and the judge therefore permitted the State to amend the indictment. The jury subsequently convicted Brown of all of the sexual abuse charges, including Count XV.

On appeal, Brown argues that the judge erred by allowing the date range on Count XV to be amended, asserting that the amendment created a fatal variance between the evidence presented at grand jury and the evidence presented at trial.

Alaska Criminal Rule 7(e) permits the amendment of indictments so long as the amendment does not charge an additional or different offense, and the defendant is not prejudiced. Whether an amendment to an indictment creates a fatal variance requiring reversal of the conviction is a question of law that we review de novo.[16]

We find no fatal variance here. As we explained in *Larkin v. State*, "Alaska law has always followed the common-law rule that the date of the offense is generally not an element of the government's case, so long as the offense occurred within the pertinent statute of limitations."[17] Thus, "a variance between the date specified in the indictment and the date revealed by the evidence at trial will not support an attack on the judgement unless the variance prejudiced the defendant's ability to prepare or present

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[16] *Bowers v. State*, 2 P.3d 1215, 1217-18 (Alaska 2000).

[17] 88 P.3d 153, 156 (Alaska App. 2004).

their defense."[18] Here, as the superior court noted, Brown was not prejudiced by the amendment to the date range because he was asserting a blanket defense — that none of the alleged sexual abuse occurred — and was not challenging the specific timing of the alleged abuse.[19]

On appeal, Brown argues that he was prejudiced by the amendment because A.B.'s trial testimony was that the cunnilingus had occurred on more than one occasion during sixth and seventh grades. He asserts that the amendment therefore modified what was originally one charged act of cunnilingus into multiple charged acts of cunnilingus.

We disagree. Although the evidence at trial suggested that Brown had engaged in multiple acts of cunnilingus, the prosecutor only pursued one conviction for these acts and Brown was only convicted of one count of cunnilingus. Moreover, the jury was properly instructed by the superior court regarding the need for factual unanimity as to the act for which he was convicted.

*Brown's indictment did not contain multiplicitous counts that required merger at sentencing*

On appeal, Brown argues for the first time that various counts of his indictment are multiplicitous, and that some of his convictions therefore violate the double jeopardy clause of the Alaska Constitution. It is well-settled that an appellant may raise a double jeopardy claim for the first time on appeal because a violation of the double jeopardy clause is a fundamental error.[20]

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[18] *Id.* at 157.

[19] *Cf. Covington v. State*, 711 P.2d 1183 (Alaska App. 1985) abrogation on other grounds recognized by *Anderson v. State*, 337 P.3d 534, 537-38 (Alaska App. 2014).

[20] *Johnson v. State*, 328 P.3d 77, 83 (Alaska 2014).

Multiplicity in an indictment can occur where the indictment charges multiple violations of the same statute that are predicated on the same criminal conduct. "The principal danger raised by a multiplicitous indictment is the possibility that the defendant will receive more than one sentence for a single offense," in violation of the prohibition on double jeopardy.[21]

Here, the indictment alleged that Brown engaged in penile penetration of A.B. "on or about September 2010 to August 2011" (Count V), "on or about August 2011 to January 2012" (Count XIII) and "on or about January 2012 to May 2012" (Count XVI). The date ranges for each of these counts therefore overlapped one another by a month.

A similar overlap problem exists with regard to the A.B. fellatio counts. Count VI alleges that Brown engaged in fellatio with A.B. "on or about September 2010 to August 2011," Count XIV alleges that the fellatio with A.B. occurred "on or about August 2011 to January 2012" and Count XVII alleges that the fellatio with A.B. occurred "on or about January 2012 to May 2012." As with the penile penetration charges, there is a month's overlap in the date ranges for each of these three counts.

Thus, given the way these counts were charged in the indictment, it was seemingly possible for the jury to convict Brown of two counts for the same conduct. That is, the jury could potentially convict Brown of Counts V and XIII based on a single August 2011 incident involving penile penetration and could also convict Brown of Counts VI and XIV based on a single August 2011 incident involving fellatio. Likewise, the jury could potentially convict Brown of Counts XIII and XVI based on a single January 2012 incident involving penile penetration, and could convict Brown of Counts XIV and XVII based on a single January 2012 act of fellatio.

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[21] *United States v. Mann*, 701 F.3d 274, 285 (8th Cir. 2012).

However, as Brown acknowledges, the manner in which a case is litigated and the evidence adduced at trial can cure what would otherwise appear to be multiplicitous counts in an indictment.[22] Brown concedes that this occurred with regard to Counts XVI and XVII. At trial, A.B. testified that Brown subjected her to penile penetration and fellatio sometime in March 2012 — a time period that falls outside the periods of overlap. Therefore, it is clear that the factual basis for the convictions of Counts XVI and XVII did not overlap with the factual basis for any of the other convictions, and Brown's double jeopardy rights were not violated with regard to these counts.

Brown argues that the same degree of certainty is not present with regard to the other counts because the factual basis for those counts was more ambiguous, leaving open the possibility that the jury convicted Brown of Counts V and XIII based on the same August 2011 act of penile penetration, as well as the possibility that the jury convicted Brown of Counts VI and XIV based on a single August 2011 act of fellatio. Brown therefore argues that these counts should have merged.

We disagree with Brown that the factual basis for these counts was ambiguous. During closing argument, the prosecutor explained to the jury that the charges involving A.B. were "broken down by grade." The school year in Alaska begins in August. Therefore, Counts V and VI covered the sexual abuse that occurred when A.B. was in seventh grade (through the end of the summer of A.B's seventh grade) and Counts XIII and XIV covered the sexual abuse that occurred when A.B. was in eighth

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[22] *Harvey v. State*, 1996 WL 658501 at *4 (Alaska App. Nov.13, 1996) (unpublished) (citing *State v. Covington*, 711 P.2d 1183, 1184-85 (Alaska App. 1985); *see also United States v. Brandom*, 320 F. Supp. 520, 525 (W.D. Mo. 1970) ("[M]ultiplicity may not be a ground for dismissal when it may be remedied by election of counts or by the instructions given by the court.").

grade. At trial, A.B. testified that Brown had sexual intercourse with her during her seventh grade year (Count V) and also separately confirmed that he had sexual intercourse with her during the first semester of eighth grade (Count XIII). Likewise, A.B. testified that Brown forced fellatio on her when she was in seventh grade (Count VI) and that fellatio also occurred during the first semester of eighth grade (Count XIV). Thus, although the date ranges of the counts might appear multiplicitous on the face of the indictment, they were not actually multiplicitous in terms of how the sexual abuse was characterized and differentiated at trial.

Moreover, even if the prosecutor's explanation was insufficient to cure the potential multiplicity problem, it is clear that the trial court's jury instructions did. The trial court specifically instructed the jury that because evidence of more than one act could support a conviction for each count of first-degree sexual abuse, the jurors needed to be unanimous as to what conduct satisfied each count, while also remembering that each count charged a separate offense.

Accordingly, we reject Brown's assertion that certain counts were multiplicitous and that those convictions should have merged at sentencing.

*Conclusion*

The judgment of the superior court is AFFIRMED.